No. 93-5830

In The
Supreme Court of the United States
October Term, 1993

Kevin Albright,
Petitioner,
v.
Roger Oliver and City of Macomb, Illinois,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a complaint alleging that a police officer has sworn out a criminal information without an objectively reasonable belief in probable cause states a violation of substantive due process in the absence of an allegation that the police officer corrupted the prosecutor's decision to initiate a prosecution.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. *Amici*'s members will be directly affected by the Court's resolution of the issues presented.

In this case, the Court is called upon to address whether, and under what circumstances, a criminal prosecution terminating in favor of the accused violates the Constitution. Petitioner's asserted right originates in the substantive component of the Due Process Clause, an "unchartered area" of "scarce and open-ended" guideposts, *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992); his proposed standard for finding that a violation has occurred would impose liability far more frequently than the common law of malicious prosecution. Because petitioner's proposed standard finds no support in the Court's substantive due process jurisprudence and would, because of its disruptive impact on the criminal process, be gravely injurious to the public interest, *amici* submit this brief to assist the Court in the resolution of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is whether, under the substantive component of the Due Process Clause, petitioner Kevin Albright can hold liable respondents, Roger Oliver, a police detective with twenty years experience, and the City of Macomb, Illinois, his employer, for "initiating and pursuing a criminal prosecution against him without probable cause or an objectively reasonable belief in probable cause." Pet. Br. 3. At the heart of petitioner's complaint are two instances of respondent Oliver's conduct: (1) his swearing out of a criminal information charging Albright with a crime "based upon the inherently unre-

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

liable statements" of Veda Moore, a police informant, and (2) his testimony at a preliminary hearing during which, petitioner alleges, he "recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified." Complaint at ¶¶ 19, 23; pet. a. 59-62. Petitioner's attempt to impose liability on respondents for this conduct is without foundation and fraught with practical difficulties.

Petitioner's proposed standard for determining whether the substantive component of the Due Process Clause has been violated—initiating a criminal prosecution without probable cause—would, even with the operation of qualified immunity, impose liability for merely negligent conduct on the part of the police. This standard, however, finds no support in the Court's substantive due process jurisprudence. While the Court has, over the years, articulated various formulations in attempting to give substance to the Due Process Clause, petitioner's standard does not fall within the type of intentional or deliberate decisions with which the Due Process Clause has traditionally been concerned. *See, e.g., Daniels v. Williams,* 474 U.S. 327, 332 (1986).

Moreover, while there is a tradition that a criminal prosecution be based on probable cause, *see, e.g., United States v. Calandra,* 414 U.S. 338, 343 (1974), it cannot be argued that initiating charges without an "objectively reasonable belief in probable cause," Pet. Br. at i, "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934). As both the grand juror's oath and the common law of malicious prosecution demonstrate, it is maliciousness, and not negligence or recklessness in the initiation of a criminal prosecution, that offends the "traditions and conscience of our people." *Id.*

Petitioner's standard would, in addition, distort the functioning of the criminal process. Given that annually some twenty-eight percent of all felony prosecutions terminate in favor of the accused, *see* U.S. Department of Justice,

Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991* 547 (Table 5.55), petitioner's proposed standard would lead to a flood of litigation. This would have a grave impact on the public safety because the police, if faced with personal liability for negligence in initiating charges, will decline to present close cases to the prosecutor's office despite the actual guilt of the suspect. And ironically, prosecutors, aware of the potential liability of the police, will, instead of promptly dismissing weak cases, pursue them in the hopes of developing evidence to negate potential claims.

Second, taken on a more specific level, petitioner's complaint asserts that Oliver initiated and continued a baseless prosecution because he relied "upon the inherently unreliable statements" of Moore. Complaint at ¶ 19, pet. a. 59. At bottom, petitioner's complaint is that Oliver relied on statements of an informant which Albright disputed. The Court, moreover, has never held that the decision to prosecute must be based on "reliable" evidence, but rather has repeatedly eschewed judicial inquiry into the quality and adequacy of the evidence necessary to support a criminal prosecution. *See, e.g., United States v. Calandra,* 414 U.S. at 344-45; *Costello v. United States,* 350 U.S. 359, 362-63 (1956). And as the Court has recognized, a judicial "probable cause determination is not a constitutional prerequisite to the charging decision." *Gerstein v. Pugh,* 420 U.S. 103, 125 n.26 (1975). As evidenced by the adoption of the Sixth Amendment, the "reliability" of the evidence supporting a criminal prosecution is to be tested in the crucible of the trial where the many protections of that amendment apply. Clearly then, petitioner's asserted right—to not be subjected to a criminal prosecution based on "inherently unreliable" information—"cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Reno v. Flores,* 113 S.Ct. 1439, 1447 (1993) (citations omitted).

Finally, petitioner's allegations are deficient as a matter of law to impose liability on respondent Oliver, a police detective, for initiating and continuing a criminal prosecution. While "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Monroe v. Pape*, 365 U.S. 167, 187 (1961), that background does not hold a police officer liable for initiating a prosecution where he "merely states what is believed, leaving the decision to prosecute entirely to the uncontrolled discretion of" the prosecutor. W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 119, at 876 (5th ed. 1984) (Prosser). Petitioner's complaint totally ignores the independent judgment and discretion exercised by the State's Attorney in initiating the prosecution against him. *See People v. Dandridge*, 505 N.E.2d 30, 31 (Ill. App. 1987); *People v. Woollums*, 379 N.E.2d 1385, 1390 (Ill. App. 1978). Because petitioner makes no allegation that Oliver withheld or falsified the evidence against him, there is no basis for concluding that "an intelligent exercise of the [prosecuting] officer's discretion [was] impossible," *Restatement (Second) of Torts* § 653 cmt. g, or that Oliver " 'caused' or 'procured' the prosecution." *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988).

Nor does petitioner's allegation that Oliver improperly continued the prosecution by "recklessly fail[ing] to advise the court of the inherently unreliable nature of the information to which he testified," Complaint at ¶¶ 19, 23; pet. a. 59-62, constitute the type of active participation required to impose liability. *See Restatement* § 655; Prosser § 119, at 872. As both sources note, merely testifying in a proceeding is not enough to impose liability for continuing a prosecution. *Id.* Because petitioner's complaint has failed to allege the "insist[ence] upon or urging [of] further prosecution" necessary to demonstrate "active participation," Restatement § 655 cmt. c., it is insufficient as a matter of law to impose liability.

ARGUMENT

I. A VIOLATION OF THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE MUST BE PREDICATED ON MORE THAN JUST NEGLIGENT CONDUCT

As the Court has recently reaffirmed, the "boundaries [of substantive due process] are not susceptible of expression as a simple rule." *Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2806 (1992). "[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1068 (1992) (citing *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985)). Accordingly, " '[s]ubstantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires [the Court] to exercise the utmost care whenever [it is] asked to break new ground in this field.' " *Flores*, 113 S.Ct. at 1447 (quoting *Collins*, 112 S.Ct. at 1068).

At its greatest level of generality, petitioner's complaint asserts that respondents deprived him of a right protected by the substantive component of the Due Process Clause when they "initiat[ed] and pursu[ed] a criminal prosecution against him without probable cause." Pet. Br. 3; *see also id.* at 9, 21-22. As a practical matter, petitioner's proposed probable cause standard, which requires plaintiffs to demonstrate only objective unreasonableness, would result in a finding that the Constitution has been violated based on merely negligent conduct on the part of respondents. Indeed, petitioner's probable cause standard has no foundation in the text of the Fifth or Fourteenth Amendments and is contrary to the Court's careful formulations of the type of governmental conduct that violates the substantive component of the Due Process Clause.

As the Court has recognized, " '[t]he substance of all definitions' of probable cause 'is a *reasonable* ground for the belief of guilt.' " *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (quoting *McCarthy v. De Armit*, 99 Pa. 63, 69 (1881)) (emphasis added); *accord* Prosser § 119, at 876. The probable cause inquiry thus asks whether "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed." *Carroll v. United States*, 267 U.S. 132, 161 (1925) (citation omitted). As a leading authority has noted, "[a] want of probable cause thus involves unreasonable conduct under the circumstances and in that respect bears some resemblance to the idea of negligence." Prosser § 119, at 876; *see also Black's Law Dictionary* 1032 (6th ed. 1990) (defining negligence as "the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances").

Petitioner's proposed standard—that the Due Process Clause is violated whenever a criminal prosecution is initiated without probable cause—would result in a finding that the Constitution has been violated based on merely negligent conduct. And while petitioner would grant law enforcement officers qualified immunity, and thus impose liability only if an officer "files a criminal charge . . . without an objectively reasonable belief in probable cause," Pet. Br. 36, because the probable cause determination is already defined in terms of reasonableness, *see, e.g., Brinegar*, 338 U.S. at 175; *Carroll*, 267 U.S. at 161, the protection of qualified immunity is chimerical. In short, petitioner's standard for finding that the Constitution has been violated and for imposing liability on a police officer when charges have been initiated are the same—ordinary negligence. This standard of ordinary

negligence has no foundation in either the text of the Due Process Clause or the Court's cases interpreting it. Rather, it stems solely from petitioner's attempt to graft the Court's Fourth Amendment jurisprudence onto the Due Process Clause, an ill-considered effort that disregards the teachings of the Court's substantive due process cases.

The Court has long exercised its "reasoned judgment," *Casey*, 112 S.Ct. at 2806, to articulate various formulations in attempting to give substance to the Due Process Clause. As Justice Harlan observed:

> Due Process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them.

Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

The Court has thus characterized the Due Process Clause as " 'intended to secure the individual from the arbitrary exercise of the powers of government,' " *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (*quoting Hurtado v. California*, 110 U.S. 516, 527 (1884) (*quoting Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)), and "to prevent governmental power from being 'used *for purposes of oppression*.' " *Id.* (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)) (emphasis added). The Court has accordingly noted that the "guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels*, 474 U.S. at 331. Absent an in-

tentional deprivation of liberty, a state actor simply has not "engag[ed] in conduct that 'shocks the conscience.'" *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)).

Petitioner's proposed standard thus finds no support in the Court's cases construing the Due Process Clause. The very notion of an "arbitrary exercise of the powers of government," *Daniels*, 474 U.S. at 331 (citations omitted), suggests conduct "arising from will or caprice," *Webster's New Collegiate Dictionary* 57 (1981), not negligence or reckless indifference. Similarly, neither negligent nor recklessly indifferent conduct in initiating a prosecution can fairly be said to involve an exercise of government power "used for the purposes of oppression." *Daniels*, 474 U.S. at 665. Such conduct simply does not fall within the type of "*deliberate* decisions of government officials to deprive a person of life, liberty or property" to which the Due Process Clause has been historically applied. *Id.* To require only a lesser showing of negligence or reckless indifference would "open the federal courts to lawsuits where there has been no affirmative abuse of power," *id.* (quoting *Parratt v. Taylor*, 451 U.S. 527, 549 (1981) (Powell, J., concurring)), and "seems not only to trivialize, but grossly to distort the meaning and intent of the Constitution." *Id.* (quoting *Parratt*, 451 U.S. at 545 (Stewart, J., concurring)).

To be sure, there is a tradition that a criminal prosecution be based on "probable cause." *See United States v. Calandra*, 414 U.S. 338, 343 (1974). To recognize as much, however, does not inexorably lead to the conclusion that negligence or even recklessness by a police officer in "initiating" charges "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

As Blackstone noted, "the finding of an indictment is only in the nature of an inquiry or accusation, which is

afterward to be tried and determined." 4 William Blackstone, *Commentaries on the Laws of England* 302 (1856) (J. Wendell, ed.). As evidenced by the Sixth Amendment and the many protections it provides the accused in the course of trial, the framers were clearly aware that no system of accusation is foolproof. *Cf. Baker v. McCollan*, 443 U.S. 137, 145 (1979) ("The Constitution does not guarantee that only the guilty will be arrested."). Accordingly, while the framers interposed the requirement of an indictment or presentment by a grand jury before subjecting a suspect to trial for a "capital, or otherwise infamous crime," U.S. Const. amend. V, it is clear that their primary purpose was to protect the accused from malicious and oppressive criminal prosecutions. As the Court has recognized:

> Under the ancient English system . . . the most valuable function of the grand jury was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded on credible testimony *or dictated by malice or personal ill will.*

Hale v. Henkel, 201 U.S. 43, 59 (1906) (emphasis added); *see also Costello v. United States*, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and *unbiased* grand jury, . . . if valid on its face is enough to call for trial of the charge on the merits.") (emphasis added).

Consistent with the historic role of the grand jury, the grand juror's oath prescribes:

> You will present no person through malice, hatred, or ill-will, nor leave any unpresented through fear, favor or affection, or for any reward, or the promise or hope thereof; but in all your presentments you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding . . . .

American Law Institute, *Code of Criminal Procedure* § 126 (1930) (*A.L.I. Code of Criminal Procedure*); *see also Federal Grand Jury Handbook* 12 (1958). The grand juror's oath compellingly demonstrates that a substantive due process claim for initiating a prosecution contains both an objective and subjective component. The oath does not bind grand jurors to vote for an indictment only if a reasonable grand juror would do so or to exercise the skill or understanding of a reasonable grand juror. Rather, the oath, in binding grand jurors to "present the truth . . . according to the best of [their] skill or understanding," *A.L.I. Code of Criminal Procedure* § 126, necessarily embodies a subjective inquiry. In voting to indict, grand jurors may have acted upon evidence that no reasonable grand juror would have voted to indict on. But so long as those grand jurors acted "according to the best of [their] skill or understanding," *id.*, they have not violated their oaths. And if grand jurors, with their wide ranging authority to both investigate and indict, *see, e.g., United States v. Williams*, 112 S.Ct. 1735, 1742 (1992), do not violate their oaths under such circumstances, then it is difficult to understand why merely initiating charges without an objectively reasonable belief in probable cause "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder*, 291 U.S. at 105. As the grand juror's oath demonstrates, "the traditions and conscience of our people," *id.*, are offended only if grand jurors, in violation of their oath, "present [a] person through malice, hatred, or ill-will." *A.L.I. Code of Criminal Procedure* § 112; *see also Federal Grand Jury Handbook* at 12.

While the grand jury system represented the ultimate protection for a criminal suspect, it was not the exclusive means of initiating a criminal prosecution under the common law. Charging by information "is as ancient as the common law itself," 4 W. Blackstone, *Commentaries* 309, and has long been sanctioned by this Court. *Hurtado v.*

California, 110 U.S. 516 (1884). It is now used not only in the federal system, *see* Fed. R. Crim. P. 7, but also in approximately two-thirds of the States. Yale Kamisar *et al., Modern Criminal Procedure* 890-91 (7th ed. 1990). And as the Court has recognized, "a judicial hearing is not [a] prerequisite to prosecution by information." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975).

Yet despite the widespread use of the information, the common law has never recognized a claim for "a groundless criminal prosecution." *See* Pet. Br. at i (Petitioner's Question Presented). Rather, it recognizes a claim for *malicious* prosecution which, just as its name suggests, does not lie merely because an accuser lacked probable cause. *See, e.g., Wheeler v. Nesbitt*, 65 U.S. (24 How.) 544, 549-51 (1861) ("The plaintiff must show that the defendant acted from *malicious motives* in prosecuting him") (emphasis in original); *Munns v. DeNemours*, 17 F. Cas. 993, 995 (C.C.D. Pa. 1811) (No. 9,926) ("The question upon which this cause must be decided, is . . . whether the charge was made maliciously, and without probable cause."). As these authorities demonstrate, for this claim to be cognizable, the accuser had to have acted with " '[m]alice,' *or* [*for*] *a primary purpose other than that of bringing* [*the*] *offender to justice*." Prosser § 119, at 871 (emphasis added); *see also Restatement (Second) of Torts* §§ 653, 668 (1977). By reading out the subjective component of malice, petitioner's proposed standard would be far easier to satisfy than the standard of both the common law and Illinois for malicious prosecution and would do far more than make the Due Process Clause "a font of tort law to be superimposed upon" the States. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Rather, it would make the Due Process Clause a wellspring for claims by ex-defendants, chilling the police in the performance of their duties.

The flood of such litigation would be substantial. As a 1988 survey of the Bureau of Justice Statistics on the disposition of prosecuted criminal cases in fourteen States

indicates, twenty-eight percent of these cases resulted in dismissal, acquittal or nolle prosequi; the total number of persons prosecuted in these States was 536,708. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1991* 547 (Table 5.55).[2] If, as petitioner argues, the Due Process Clause is violated whenever a police officer initiates charges while lacking probable cause or an objectively reasonable belief in probable cause, then many of the hundreds of thousands of formerly accused would be entitled to bring suit and conduct discovery as to whether the police officer was negligent in initiating the charges against them.

The impact of petitioner's regime on the public safety would be substantial and would seriously disrupt the functioning of the criminal process. Police officers, faced with the prospect of personal liability for negligence in initiating charges, will decline to do so in close cases despite the actual guilt of the suspect. Petitioner's proposed liability regime would thus threaten the public

[2] Other Department of Justice statistics are consistent with these figures. A Justice Department survey of cases prosecuted by twelve States in 1987 indicates that for all offenses, twenty-seven percent resulted in dismissal, acquittal or nolle prosequi; the total number prosecuted was 520,925. *See* U.S. Department of Justice, *Sourcebook of Criminal Justice Statistics—1990* 520 (Table 5.42).

Even though in many of these cases, there has been a judicial determination of probable cause to bind over for trial, this finding is generally not appealable. *See Whitley v. Seibel*, 676 F.2d 245, 249-50 (7th Cir. 1982). Accordingly, because defendants have arguably not received a "full and fair opportunity to litigate" the existence of probable cause, *Allen v. McCurry*, 449 U.S. 90, 101 (1980), they are not collaterally estopped from raising the issue in a subsequent § 1983 suit. *Cf.* Prosser § 119, at 881 (noting that magistrate's finding of probable cause only furnishes evidence or a presumption of probable cause); *White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988) ("though an indictment by a grand jury is generally considered *prima facie* evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant misrepresented, withheld, or falsified evidence").

safety by allowing many guilty persons to avoid prosecution. Moreover, because the police simply will not present these cases to the prosecuting authority, petitioner's regime would undermine the role of the prosecutor by denying that office the right to review cases to determine whether further proceedings are warranted.

Even where the police continue to refer close cases to the prosecuting authority, petitioner's regime would be injurious to the public interest. Prosecutors, aware of the potential liability of the police for initiating "baseless prosecutions," would pursue cases simply for the purpose of negating the elements of the cause of action.[3] Petitioner's regime would not only lead to the squandering of scarce resources, but also to the ironic result that a suspect will be subjected to the anxiety of a continued prosecution which otherwise would have been promptly dismissed.

Petitioner's reading out of the subjective component of malice thus runs counter to the strong public policy favoring the "bring[ing of] criminals to justice" and the finality of litigation. Prosser § 119, at 871, 876. If, under the common law, these policies require that the ordinary citizen who accuses one of crime "must be given a large degree of freedom to make mistakes and misjudgments without being subjected to liability," *id.* at 871, then surely a police officer, who must investigate numerous reports of various crimes, deserves no less.

To be sure, being subjected to any criminal prosecution imposes burdens on a defendant. Those burdens, however, must be balanced against the public interest

[3] At least under the common law, a plaintiff was required to prove as an element of his cause of action the "[t]ermination of the proceeding in [his] favor." Prosser § 119, at 871. Moreover, even though "[p]robable cause is judged by appearances to the defendant at the time he initiates [the] prosecution," later-discovered evidence is relevant to establish the defense of "the accused's guilt in fact." *Id.* Accordingly, under petitioner's regime, prosecutors will have a strong incentive to pursue further proceedings in order to protect the police from liability.

in bringing criminals to justice. *Id.* The long tradition of the common law of malicious prosecution demonstrates that these burdens, by themselves, do not justify imposing liability merely for negligent conduct.[4]

Moreover, to argue, as petitioner does, that the substantive component of the due process clause provides a right to not be prosecuted without probable cause because such a prosecution "unreasonably puts an accused at risk of [being] wrongful[ly] convict[ed]," Pet. Br. at 19, simply proves too much. Absent a complete abdication of the judicial role or misconduct on the part of the police, a prosecution initiated without probable cause can never result in an unjust conviction. At trial, "the prosecution has the burden of production on every element of the offense charged." *Project—Twentieth Annual Review of Criminal Procedure*, 79 Geo. L. J. 591, 1076 n.2096 (1991). If a prosecution lacks probable cause, by definition it will not survive the more exacting standard of a motion for judgment of acquittal.[5] Even

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[4] Petitioner's standard for imposing liability is also firmly repudiated by the *Restatement*, which states:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rule stated in this Section *even though the information proves to be false and his belief was one that a reasonable man would not entertain.*

Restatement § 653 cmt. g (emphasis added).

[5] *Compare* Prosser § 119, at 876 ("Probable cause is a reasonable ground for belief in the guilt of the party charged"; however, "the facts need not warrant a belief in guilt beyond a reasonable doubt[.]"); *Brinegar*, 338 U.S. at 175 (quoting *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813)) (Probable cause "'means less than evidence which would justify condemnation' or conviction."), *with* Yale Kamisar *et al.*, *Modern Criminal Procedure* 1403 (7th ed. 1990) (discussing motion for judgment of acquittal) ("The prevailing view is that 'the criminal defendant is entitled to an acquittal if reasonable men could not conclude on the evidence

when a defendant's lawyer fails to move for dismissal, the Due Process Clause's "requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt," *In Re Winship*, 397 U.S. 358, 361 (1970), ensures that a defendant will not be "wrongfully convicted." If a defendant has been convicted, it is because the State has met its burden of proving beyond a reasonable doubt "the existence of every fact essential to constitute the crime charged." *Davis v. United States*, 160 U.S. 469, 485 (1895). In the unlikely event that both judge and jury have abdicated their roles resulting in a conviction based on evidence which does not even establish probable cause, then appellate review, applying the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)—whether, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"—surely will result in a reversal of the conviction. *See also id.* at 318 ("the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . [is] to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt"). If the prosecution has met this standard, it has necessarily met the lesser standard of probable cause. Contrary to petitioner's assertion then, a prosecution lacking in probable cause does not, by itself, subject an accused to an unreasonable risk of being wrongfully convicted.

Amici acknowledge that a prosecution lacking probable cause and motivated by malice can, in some circumstances, subject an accused to an unreasonable risk of being wrongfully convicted. Where, for example, the

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taken in the light most favorable to the prosecution that guilt has been proved beyond a reasonable doubt.'"); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt.").

police corrupt the truth-seeking function of the criminal trial process by engaging in egregious conduct such as destroying or withholding exculpatory evidence, *cf. Arizona v. Youngblood*, 488 U.S. 51 (1988); *Brady v. Maryland*, 373 U.S. 83 (1963); falsifying evidence, *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988); or suborning perjury, *cf. Mooney v. Holohan*, 294 U.S. 103 (1935), it is fair to say that they have "arbitrar[ily] exercise[d]" governmental power "for purposes of oppression." *Daniels*, 474 U.S. at 331 (citations omitted); *see also Morales v. Ramirez*, 906 F.2d 784, 788 (1st Cir. 1990); *Barnier v. Szentmiklosi*, 810 F.2d 594, 599 (6th Cir. 1987). Not only does such conduct "offend[] . . . principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder*, 291 U.S. at 105, it also embodies the type of "*deliberate* decisions of governmental officials to deprive a person of . . . liberty" with which the substantive component of the Due Process Clause has been traditionally concerned.[6] *Daniels*, 474 U.S. at 332 (emphasis in original); *cf. Youngblood*, 488 U.S. at 58 (absent bad faith on the part of police, "failure to preserve potentially useful evidence does not constitute a denial of due process"). A malice component is thus consistent with the Court's substantive due process cases and prevents the "trivial-

[6] In *Brady*, the Court noted that "the suppression by the prosecution of evidence favorable to an accused upon request violates Due Process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. In the Court's view, the prosecutor's motive was irrelevant because of the need to provide a fair trial. *Id.* As the Court noted, this principle was "not [founded on] punishment of society for [the] misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* Accordingly, *Brady* is properly viewed as resting on the procedural component of the Due Process Clause, the purpose of which "is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State." *Collins*, 112 S.Ct. at 1068. Petitioner, of course, has repeatedly stated that his claim is based on the substantive component of the Due Process Clause. *See* Pet. Br. 12-13, 19-22.

iz[ation]" and "distort[ion] of the meaning and intent of the Constitution," *Daniels*, 474 U.S. at 330 (quoting *Parratt*, 451 U.S. at 545 (Stewart, J., concurring)), by ensuring that only "affirmative abuse[s] of power," *id.* (quoting *Parratt*, 451 U.S. at 549 (Powell, J., concurring)), are cognizable under the Due Process Clause. Because no such affirmative abuse is alleged by petitioner, his complaint was properly dismissed.

II. THE DUE PROCESS CLAUSE DOES NOT REQUIRE CRIMINAL CHARGES TO BE BASED ON "RELIABLE" EVIDENCE

1. Turning to the specific factual allegations of the complaint, the gravamen of petitioner's baseless prosecution claim is that Oliver lacked probable cause to initiate the prosecution because he relied "upon the inherently unreliable statements" of an informant. Complaint at ¶ 20, pet. a. 43; *see also id.* at ¶ 24, pet. a. 45-46. The Court has, of course, recognized that historically, grand jury indictments have been based on "probable cause." *Calandra*, 414 U.S. at 343. But even if the Due Process Clause requires that a criminal prosecution be based on probable cause, petitioner's standard, with its roots in the Court's Fourth Amendment jurisprudence, *see, e.g., Illinois v. Gates*, 462 U.S. 213, 232-35 (1983), is inapplicable to the decision to initiate criminal charges.

As the Court has stated, "probable cause is a fluid concept." *Id.* at 232. Because arrest and detention involve a significant restraint on an individual's liberty qualitatively more serious than being charged with a crime, to the extent the Due Process Clause may require that the initiation of charges be based on probable cause, the probable cause inquiry must be tailored to the different interests which the Due Process Clause serves.[7] The Court has

[7] As Blackstone noted:

> In order to carry on [an action for malicious prosecution], it is necessary that the plaintiff should obtain a copy of the record of his indictment and acquittal; but, in prosecutions for felony, it is usual to deny a copy of the indictment, where there is *any*,

acknowledged as much holding that because a judicial "probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975).

Of equal importance, the Court has never held that the decision to prosecute must be based on "reliable" evidence, but rather, has eschewed judicial inquiry into the adequacy and reliability of the evidence supporting the decision to prosecute.[8] The Court, for example, has long recognized that:

> The grand jury's sources of information are widely drawn, and the validity of an indictment is not affected by the character of the evidence considered. Thus, an indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence, or even on the basis of information obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination.

> *the least, probable cause* to found such prosecution upon. For it would be a very great discouragement to the public justice . . . if prosecutors, who had a *tolerable ground of suspicion*, were liable to be sued at law whenever their indictments miscarried.

III W. Blackstone, *Commentaries* at 126 (1856) (emphasis added) (footnotes omitted).

[8] The Court's longstanding concern that the police, when using informants, establish that the information provided is reliable prior to conducting searches or arrests, *see Gates*, 462 U.S. at 230-238; *Spinelli v. United States*, 393 U.S. 410, 414-419 (1969), *overruled by Gates*; *Aguilar v. Texas*, 378 U.S. 108, 112-15 (1964), *overruled by Gates*, is supported because informants either frequently retain anonymity or demand it as a condition of giving information to the police; the informer's privilege also protects them from being called to testify. *See generally* 1 Wayne R. LaFave, *Search and Seizure—A Treatise on the Fourth Amendment* § 3.3(g) (2d ed. 1987). This concern is minimized, however, when, as here, the prosecutor's case against the accused will require the testimony of the source of the "unreliable" statements and the defendant will have the opportunity to cross-examine the witness.

Calandra, 414 U.S. at 344-45 (citations omitted); *see also Costello v. United States*, 350 U.S. 359, 362-63 (1956). Petitioner's attempt to graft the Fourth Amendment's probable cause standard onto the Due Process Clause is thus inconsistent with the Court's settled understanding of the quality of evidence necessary to support the initiation of a criminal prosecution.

At common law, the grand jury was "not hampered by rigid procedural or evidential rules," but instead, "w[as] free to make [its] presentments or indictments on such information as [it] deemed satisfactory." *Costello*, 350 U.S. at 362. Grand juries, while duty bound to "present the truth," *see Federal Grand Jury Handbook* at 12-13; *A.L.I. Code of Criminal Procedure* § 126, have had free reign to consider evidence inadmissible in a trial because of its unreliability. As the Court noted in *Costello*, "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act." 350 U.S. at 362. Absent prosecutorial abuse, the grand jury's decision to indict was unreviewable. As Justice Nelson, while riding circuit, stated: "No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof." *United States v. Reed*, 27 F. Cas. 727, 738 (C.C.N.D.N.Y. 1852) (No. 16,134).

Accordingly, the Court has never sanctioned the quashing of indictments because they are based on incompetent, unreliable or insufficient evidence. *See United States v. Williams*, 112 S.Ct. 1735, 1745-46 (1992); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 261 (1988). In *Holt v. United States*, 218 U.S. 245 (1910), an indictment was challenged on the ground that it was based, in part, on incompetent evidence, and aside from which "there was very little evidence against the accused." 218 U.S. at 247. The Court nonetheless refused to quash the indictment. *Id.* at 248.

In *Costello,* the defendant moved to dismiss an indictment on the ground that it had been based entirely on hearsay evidence. 350 U.S. at 361. The Court held the indictment was proper, stating:

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more.

350 U.S. at 363 (footnote omitted). If an indictment can be lawfully based on hearsay evidence, which is otherwise inadmissible in a trial when it lacks "adequate 'indicia of reliability,' " *Ohio v. Roberts,* 448 U.S. 56, 66 (1980),[9] it is difficult to understand why a criminal information, lacking in probable cause solely because it is based "upon the inherently unreliable statements," Complaint at ¶ 20, pet. a. 43, of an informant, violates the Due Process Clause. *Cf. Bank of Nova Scotia,* 487 U.S. at 261 ("the mere fact that evidence itself is unreliable is not sufficient to require a dismissal of the indictment"); *cf. Lawn v. United States,* 355 U.S. 339, 348-50 (1958) (upholding indictment based on illegally obtained evidence).

Petitioner's complaint also alleges that at the preliminary hearing, "Oliver recklessly failed to advise the court of the inherently unreliable nature of the information

[9] *See also White v. Illinois,* 112 S.Ct. 736, 742-43 (1992); *Idaho v. Wright,* 497 U.S. 805, 814-22 (1990); *Bourjaily v. United States,* 483 U.S. 171, 182-84 (1987); *Chambers v. Mississippi,* 410 U.S. 284, 298 (1973).

to which he testified," resulting in the court's finding that probable cause existed to bind the matter over for further proceedings. Complaint at ¶ 24, pet. a. 46. In *Williams,* however, the Court rejected an attempt to impose on prosecutors the duty to present exculpatory evidence to the grand jury. 112 S.Ct. at 1745-46. Because "[a] complaint about the quality or adequacy of the evidence can always be recast as a complaint that the prosecutor's presentation was 'incomplete' or 'misleading,' " the Court stated that "[i]t would make little sense . . . to abstain from reviewing the evidentiary support for the grand jury's judgment while scrutinizing the sufficiency of the prosecutor's presentation." 112 S.Ct. at 1746 (footnote omitted). As the Court noted, "[r]eview of facially valid indictments on such grounds 'would run counter to the whole history of the grand jury institution' " and was required by " '[n]either justice nor the concept of a fair trial.' " *Id.* (*quoting Costello,* 350 U.S. at 364.)

The disclosure of exculpatory evidence would, of course, frequently lead the grand jury to conclude that the prosecutor's evidence is unreliable and that there is no "probable cause" to indict. Yet if the Constitution does not require a prosecutor to disclose exculpatory evidence to the grand jury,[10] then, in the context of a preliminary hearing, it certainly could not have required Oliver, in the absence of questioning by counsel, to "advise the court of the inherently unreliable nature of the information to which he testified." Complaint at ¶ 24, pet. a. 46. If petitioner is correct in his premise that the substantive component of the Due Process Clause provides a right to not be subjected to a criminal prosecution

[10] While grand jurors may require the production of exculpatory evidence, they have no duty to hear such evidence. *See A.L.I. Code of Criminal Procedure* § 139. As an accusatory body, the grand jury ordinarily assesses only the State's case; it is "to find an indictment when all the evidence before them, taken together, is such as in their judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." *Id.* at 510 (Commentary to § 140).

based on "inherently unreliable" evidence, then clearly those States which allow for charges to be brought by information must not only provide a judicial hearing but allow for cross-examination of the State's witnesses. The Court, however, has never gone so far as to hold that an "accused is entitled to judicial oversight or review of the decision to prosecute." *Gerstein*, 420 U.S. at 119. Rather, it has repeatedly held "that a judicial hearing is not [a] prerequisite to prosecution by information." *Id.*; *see also Beck v. Washington*, 369 U.S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U.S. 586, 590 (1913); *McNulty v. California*, 149 U.S. 645, 648 (1893); *cf.* Fed. R. Crim. P. 5(c) (providing that "the preliminary examination shall not be held . . . if an information against the defendant is filed in district court before the date set for the preliminary examination"). Moreover, even when the State provides for a preliminary hearing, the Constitution does not require the State to allow for the cross-examination of its witnesses unless it seeks to preserve their testimony. *Cf. United States v. Andrus*, 775 F.2d 825, 836 (7th Cir. 1985); *United States v. Harris*, 458 F.2d 670, 677-78 (5th Cir.), *cert. denied*, 409 U.S. 888 (1972).

Accordingly, while there is a tradition that criminal charges be based on probable cause, petitioner errs in his contention that the Due Process Clause requires that the charging decision be based on "reliable" evidence.[11] If the accused is not entitled to judicial review of the evidentiary support for a charge it is surely because the reliability of the evidence is to be challenged through the crucible of trial where the accused is protected by the rights of the Sixth Amendment—namely, the right "to a speedy and public trial by an impartial jury," "to be informed of the nature and cause of the accusation; to be confronted with

[11] Even today, grand juries may indict based on their own knowledge of a crime. *See Federal Grand Jury Handbook* at 12; *A.L.I. Code of Criminal Procedure* § 126. Grand jurors, while duty bound "to present the truth," *id.*, are not required to disbelieve their sources.

the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* 4 W. Blackstone, Commentaries 303 (1856) ("the finding of an indictment is only in the nature of an inquiry or accusation, which is afterward to be tried and determined"). If " '[n]either justice nor the concept of a fair trial,' " *Williams*, 112 S.Ct. at 1746 (*quoting Costello*, 350 U.S. at 364), require review of "the quality or adequacy of the evidence" underlying an indictment or information, *id.*, then surely the Due Process Clause is not violated merely because a criminal prosecution is initiated based on allegedly "inherently unreliable" information. And if an "accused is [not] entitled to judicial oversight or review of the decision to prosecute" before trial, *Gerstein*, 420 U.S. at 119, then petitioner should not be entitled to judicial review of the adequacy of the evidence supporting the decision to prosecute by bringing a "baseless prosecution" claim after trial. "The mere novelty of [petitioner's] claim is reason enough to doubt that 'substantive due process' sustains it; the alleged right [to not be prosecuted based on "inherently unreliable" evidence] certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Flores*, 113 S.Ct. at 1447 (*quoting United States v. Salerno*, 481 U.S. 739, 751 (1987) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

2. To the extent petitioner seeks to impose liability on Oliver because, in initiating the charge, he relied on an informant who was not credible, *see* Complaint ¶ 23, pet. a. 61-62, the complaint once again fails to state a violation of the substantive component of the Due Process Clause. While for the purposes of obtaining a search or arrest warrant, the Court formerly required indicia that "the informant . . . was 'credible' or his information 'reliable,' " *see Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (internal citation omitted), *overruled by Illinois v. Gates*, 462 U.S. 213 (1983), in the context of a criminal trial, credibility is always an issue to be deter-

mined by the jury. As the Court has recognized, "[e]ven the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal." *Burks v. United States*, 437 U.S. 1, 16 (1978).

That Moore gave Oliver "contradictory" information regarding the name of the person who had sold her cocaine, *see* Complaint ¶¶ 15, 18-21, 23; pet. a. 57-61, does not alter the analysis. At trial, the fact that a witness has given contradictory testimony is not enough to take the case from the jury because the trial court is required to view the evidence and its inferences in the light most favorable to the prosecution. *Burks*, 437 U.S. at 16. Clearly then, if Moore had testified at trial as to the same statements she was alleged to have made to Oliver, a trial judge could not have granted a motion for a judgment of acquittal based on Moore's lack of credibility, but would have been required to submit this issue to the jury. Given this, there is certainly no basis for concluding that the substantive component of the Due Process Clause contains a right to not be subjected to a criminal prosecution which is based on a lack of credible testimony. As the standard for ruling on a motion for a judgment of acquittal demonstrates, "the alleged right [to not be prosecuted based on a lack of credible testimony] certainly cannot be considered 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Flores*, 113 S.Ct. at 1447 (*quoting Salerno*, 481 U.S. at 751 (*quoting Snyder*, 291 U.S. at 105)).[12]

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[12] To the extent that police officers can be said to initiate criminal prosecutions, they act only as accusers and should not, in the absence of actual knowledge that a witness has lied to them, be subjected to judicial second-guessing of their decisions to refer charges to the prosecutor. *See, e.g., Restatement* § 653 cmt. g. Of course, where a police officer has actual knowledge that a witness has lied to him and nevertheless proceeds to refer charges, that officer can be said to have acted with malice.

III. ABSENT AFFIRMATIVE MISCONDUCT WHICH CORRUPTS THE PROSECUTOR'S DECISION TO PROSECUTE, A POLICE OFFICER CANNOT BE HELD LIABLE FOR INITIATING A "BASELESS PROSECUTION"

1. In seeking to impose liability on respondent Oliver, a police detective, for initiating a groundless criminal prosecution, *see, e.g.*, Complaint ¶ 20, 21, 24, pet. a. 43-46; Pet. Br. at i, 36, petitioner's complaint is fatally flawed in two additional respects. First, it ignores the independent role of the State's Attorney under Illinois law in deciding whether to pursue criminal charges. Second, petitioner's complaint makes no allegation that respondent Oliver engaged in any conduct which corrupted the prosecutor's independent assessment of the merits of the case.

The Court has, of course, stated in dictum that "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961); *see also Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986). "[T]he background of tort liability," however, does not hold a police officer liable for malicious prosecution where he "merely states what is believed, leaving the decision to prosecute entirely to the uncontrolled discretion of" the prosecutor. Prosser § 119, at 872. In such a case, a police officer "is not regarded as having instigated the proceeding." *Id.* at 872-73. As the *Restatement* explains:

> When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable . . . even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings.

Restatement § 653 cmt. g. Consistent with this background of tort liability, the Second Circuit has noted that "[t]he exercise of independent judgment by the public prosecutor and his active role in initiating criminal prosecutions . . . decrease the likelihood that a complaining witness will be considered to have 'caused' or 'procured' the prosecution, thus defeating grounds for liability under this initial prong of the common law standard." *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988).

Petitioner's complaint simply ignores this background of tort liability and the independent role of the prosecutor, both generally and as a matter of Illinois law, in initiating the charge against him. As the American Bar Association has recognized:

> Historically, the power to initiate prosecution was not vested exclusively in public officials but was shared with private citizens. The essential screening to determine whether there was substance to the charges was performed by the magistrate at the preliminary hearing or by the grand jury. The emergence of the professional prosecutor which occurred in the United States fundamentally altered this situation. The advent of the office of public prosecutor provided a new and professional medium of screening which had not previously been available; moreover, it provided continuity in office and experience in the evaluation of evidence to determine the need for prosecution.

American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* § 3.4 cmt. c. (1970) (ABA Standards). "The charging decision is the heart of the prosecution function"; *id.* at § 3.9 cmt. a., "[t]he *exercise of prosecutorial discretion* in the screening, charging, and diversion decisions are not only integral parts of the American criminal justice system but are also the most important aspect of the prosecutorial function." National District Attorneys Association, *National Prosecution Standards* 127 (2d ed. 1991) (emphasis added).

Accordingly, the complex determination of what "charges would best serve the interests of justice . . . is the prerogative and responsibility of the prosecutor." *Id.* at 131; *see also* ABA Standards at § 3.9 cmt. a.

Illinois law embodies these national standards. Under Illinois law, it is the duty of the State's Attorney "[*t*]*o commence and prosecute* all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned."[13] 55 Ill. Code § 5/3-9005 (emphasis added). The Illinois courts have recognized that under this statutory grant, "[t]he State's Attorney has the responsibility of evaluating evidence and other pertinent factors and determining what, if any, offense may be charged." *Ware v. Carey*, 394 N.E.2d 690, 694 (Ill. App. 1979) (citation omitted). As the Illinois courts have recognized, "the State's [A]ttorney is vested with exclusive discretion in the initiation and management of a criminal prosecution . . . including the decision whether to prosecute at all." *People v. Dandridge*, 505 N.E.2d 30, 31 (Ill. App. 1987); *accord Ware*, 394 N.E.2d at 694 (citation omitted); *People v. Mulcahey*, 365 N.E.2d 1013, 1016 (Ill. App. 1977), *aff'd*, 381 N.E.2d 254 (Ill. 1978); *People v. Byrnes*, 341 N.E.2d 729, 731 (Ill. App. 1975).[14]

To be sure, under Illinois law, a police officer, like any other citizen, can swear out an information. 725 Ill. Code § 5/111-3(b). There can be no doubt, however, that

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[13] Under Illinois law, the State's Attorney is a constitutional officer exercising executive power. *People v. Thompson*, 410 N.E.2d 600, 601 (Ill. App. 1980). Each county elects a State's Attorney to serve for a four year term as the county's chief legal officer. Ill. Const. Art. 6, § 19; 55 Ill. Code § 5/3-9005.

[14] *See also* ABA Standards § 1.1 (commentary) ("The prosecutor is in the best position to observe the work of the police in the investigation of crime and in the enforcement of the law. He has large responsibility in the decision whether to bring charges and, if so, what charges to bring against the accused, and the decision whether to prosecute or to dismiss charges, or to take other appropriate actions in the interest of justice.").

the decision to prosecute is vested in the State's Attorney and not the police. By statute, the State's Attorney must review and sign the information. *Id.* And as the Illinois courts have stated:

> While a police officer has a considerable latitude in charging an individual, the ultimate responsibility of filing a charge and prosecuting it lies with the State's Attorney. Thus, the actions of the police officer in the first instance yield to the judgment and discretion of the constitutional officer empowered to take final action.

People v. Woollums, 379 N.E.2d 1385, 1390 (Ill. App. 1978); *see also Dandridge*, 505 N.E.2d at 31 ("An official other than the State's Attorney does not have the authority to determine prosecution for criminal conduct.").

Petitioner simply ignores the independent judgment and discretion exercised by the State's Attorney in initiating the prosecution against him. *See* Complaint ¶¶ 20-24, pet. a. 43-46. Significantly, petitioner's complaint contains no allegation that respondent Oliver corrupted the State's Attorney's decision to prosecute him by either withholding critical evidence from the prosecutor, misrepresenting the evidence against him, or furnishing false information. *See generally id.* In the absence of such allegations, there is no basis for concluding that "an intelligent exercise of the [prosecuting] officer's discretion [was] impossible," *Restatement* § 653 cmt. g., or that respondent "'caused' or 'procured' the prosecution." *White*, 855 F.2d at 962. The existing "background of tort liability", *Monroe*, 365 U.S. at 187, thus demonstrates that the complaint, even when construed in the light most favorable to petitioner, is insufficient as a matter of law to state a claim against respondents for having "caused" or "procured" a baseless criminal prosecution.

2. Petitioner also seeks to impose liability on respondent Oliver for continuing or pursuing a baseless prosecution

based on his testimony at the preliminary hearing. According to petitioner's complaint, Oliver "recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified and which information . . . was at odds with testimony he had" given earlier to a grand jury. Complaint ¶ 24, pet. a. 46. As petitioner alleges, this led the Illinois Circuit Court to "f[ ]nd] probable cause and b[ind] the matter over for further proceedings." *Id.* Because these allegations are insufficient as a matter of law to impose liability for continuing or pursuing a prosecution, the Court should reject this aspect of petitioner's claim as well.

As the background of existing tort law demonstrates, liability can be imposed on a defendant for continuing a criminal prosecution even though the prosecution was initiated by a third party. *See Restatement* § 655. To impose liability for continuing a prosecution, however, the defendant must have "take[n] an active part in continuing or procuring the continuation of" the proceedings. *Id.; see also* Prosser § 119, at 872 ("the defendant cannot be held responsible unless the defendant takes some active part in . . . encouraging the prosecution"). "It is not enough" to allege, as petitioner has, that one has "appear[ed] as a witness against the accused either under subpoena or voluntarily, . . . thereby aid[ing] in the prosecution of the charges which he knows to be groundless." *Restatement* § 655 cmt. c; *see also* Prosser § 119, at 872 ("The defendant is not liable merely . . . for appearing as a witness against the accused, even though the testimony be perjured"); *cf. Briscoe v. LaHue*, 460 U.S. 325 (1983) (recognizing absolute immunity of police officer for testifying in criminal trial). As the *Restatement* notes, a defendant's "share in continuing the prosecution must be active, as by insisting upon or urging further prosecution." *Restatement* § 655 cmt. c.

Petitioner's allegations fall far short of the mark in establishing respondent's liability for continuing the prosecution of him. Petitioner does not allege the type of "insist[ence] upon or urging [of] further prosecution" neces-

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sary to demonstrate respondent's "active participation" in continuing the prosecution. *Id.* Rather, petitioner's allegations rest solely on Oliver's having appeared as a witness against him at the preliminary hearing, *see* Complaint ¶ 24, pet. a. 45-46, which, as a matter of law, is insufficient to establish respondent's "active participation" in the continuance of the prosecution. *Restatement* § 655 cmt. c.; Prosser § 119, at 873.

Nor does Oliver's having "recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified," Complaint ¶ 24, pet. a. 45-46, render him an "active participant." As Prosser notes, a "defendant is not liable merely . . . for appearing as a witness against the accused, even though the testimony be perjured." Prosser § 119, at 872. If perjury is not actionable, then surely petitioner's allegations are not either. And in any event, Oliver's "reckless fail[ure] to advise the court" simply does not rise to the level of deliberate and egregious conduct with which the Court's substantive due process cases have been traditionally concerned.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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